diction,[100] and unjustifiably restricts their freedom in writing decisions.[101] Furthermore, because alternative holdings promote efficiency and finality of litigation, they should be encouraged rather than discouraged.[102] An alternative holding allows a lower court to resolve a case on all possible grounds, thus providing the appellate court with findings on all possible dispositions of the issues before it. If it turns out that one of the grounds is erroneous, the appellate court can affirm the judgment on the alternative ground,[103] thus promoting efficiency and finality. On the other hand, if the alternative holding is not sound, the appellate court must remand the case to the lower court for determination of the other ground[104]—a time-consuming procedure. Finally, alternative holdings should be encouraged because they contribute to the development of the jurisdiction's precedents and law, thus providing maximum guidance to the lower courts.[105]

A final systemic policy asserted by the Burger Court for limiting the exercise of federal habeas corpus jurisdiction is that it deprives society of the right to punish the guilty.[106] While it is true that the state can retry the successful habeas petitioner, often habeas relief comes years after the original trial. As time passes, memories fade and witnesses become difficult to locate. In such cases retrial is effectively impossible and the state is forced to simply let the petitioner go.[107] The limits placed by the Burger Court on habeas review have reduced this undesirable result.[108] The necessity of freeing guilty prisoners would be reduced even further if *Sykes* is applied to alternative holdings.

In *Fay v. Noia*,[109] the Warren Court noted several policies that support unlimited federal habeas review of alternative holdings. These policies did not survive the Burger Court's decision in *Sykes*, however, and therefore do not allow a federal habeas court to disregard a state procedural

---

100. *See* United States *ex rel.* Caruso v. Zelinsky, 689 F.2d at 440.

101. *See* Hall v. Wainwright, 565 F. Supp. 1222, 1233 (M.D. Fla. 1983), *aff'd in part, rev'd in part on other grounds*, 733 F.2d 766 (11th Cir. 1984).

102. *See* Phillips v. Smith, 717 F.2d 44, 46 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984).

103. *See supra* notes 18-20 and accompanying text.

104. *See* Orr v. Orr, 440 U.S. 268, 274, 283 (1979); Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 105 (1938).

105. *Cf.* Ramirez v. Jones, 683 F.2d 712, 718 (2d Cir. 1982) (Laval, J., concurring) (state court may reach the merits despite procedural default to provide guidance to lower courts), *cert. denied*, 460 U.S. 1016 (1983); R. Cross, *supra* note 19, at 41 (dictum provides guidance).

106. *See* Engle v. Isaac, 456 U.S. 107, 127-28 (1982); Stone v. Powell, 428 U.S. 465, 490 (1976).

107. *See* Reed v. Ross, 104 S. Ct. 2901, 2907 (1984); Engle v. Isaac, 456 U.S. 107, 127-28 (1982); Rules Governing § 2254 Cases in the United States District Courts, Rule 9 advisory committee note (1982) (appearing after 28 U.S.C. § 2254 (1982)); Friendly, *supra* note 43, at 146-47.

108. *See* Engle v. Isaac, 456 U.S. 107, 127-28 (1982); *see also* Stone v. Powell, 428 U.S. 465, 490 (1976) (possibility of freeing the guilty is a reason to bar fourth amendment claims from federal habeas review).

109. 372 U.S. 391 (1963).

holding. One of the policies advanced in *Noia* was that imprisonment in violation of a petitioner's constitutional rights, whether or not properly presented, was intolerable.[110] A second policy was that "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."[111] A related concern of the Warren Court was that federal courts are better able to protect and are more receptive to the assertion of federal rights.[112]

These policies, however, retain little vitality in the wake of *Sykes* and subsequent habeas corpus cases. The Burger Court has consistently held that procedural defaults of federal rights should be respected absent a showing of cause and prejudice.[113] Therefore, *Sykes* and its progeny imply that it is entirely tolerable for a petitioner to be imprisoned despite the fact that his federal claim might have produced an acquittal or a reversal if it had been properly raised.[114] Similarly, by requiring a showing of cause and prejudice, the Burger Court has indicated that the policy of affording federal review of federal claims must be balanced against the countervailing policy of respecting valid state procedural rules.[115] Moreover, the Burger Court has explicitly rejected the idea that state courts are less able or willing to enforce federal rights.[116] Therefore, although applying the cause and prejudice test to alternative holdings offends the policies of *Noia*, those policies have been largely replaced, if not eviscerated, by *Sykes*.

The policies expressed by the Burger Court suggest the application of *Sykes* to alternative holdings. Under *Sykes*, the federal habeas court may no longer blithely overlook or overrule independent state procedural grounds. Accordingly, it should deny habeas review unless cause and prejudice is shown.

## III. The Problem of the Unclear Holding: Should *Sykes* Apply?

Unfortunately, state courts often fail to identify clearly the bases for

110. *See id.* at 401-02; Friendly, *supra* note 43, at 149-50; *see also* Sanders v. United States, 373 U.S. 1, 8 (1963) (approving policy advanced in *Noia*).

111. *Noia*, 372 U.S. at 424.

112. *See* Kaufman v. United States, 394 U.S. 217, 225-26 (1969); Friendly, *supra* note 43, at 154-55. *But see* Stone v. Powell, 428 U.S. 465, 493 n.35 (1976) (Burger Court rejecting argument that federal courts are better able to and more willing to protect federal rights).

113. *See, e.g.*, Reed v. Ross, 104 S. Ct. 2901, 2908 (1984); Engle v. Isaac, 456 U.S. 107, 129 (1982); Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977); Francis v. Henderson, 425 U.S. 536, 542 (1976).

114. *See* Wainwright v. Sykes, 433 U.S. 72, 87, 88-89 (1977).

115. *See* Reed v. Ross, 104 S. Ct. 2901, 2907-08 (1984); Wainwright v. Sykes, 433 U.S. 72, 88 (1977).

116. *See* Stone v. Powell, 428 U.S. 465, 493 n.35 (1976).

their decisions.[117] In such a situation, should *Sykes* apply? Federal courts have not answered this question uniformly.[118] For instance, the Second Circuit in *Martinez v. Harris*[119] stated that a federal habeas court should assume that a state court's summary affirmance of a conviction rests on the procedural ground, if the prosecutor argued procedural default to the state court, even if the constitutional claim was argued on the merits.[120] This assumption mandates application of *Sykes*, which is unsatisfactory for several reasons.[121] First, the Court in *Sykes* explicitly stated that the *Brown v. Allen* right to federal review of dispositive federal constitutional issues remained undisturbed.[122] Under *Martinez*, this personal right may be sacrificed on the altar of systemic interests even when no such interests exist or are unclear in a particular case.[123] The *Martinez* approach discounts the possibility that the state court's affirmance may be on the merits of the federal grounds alone, which would entitle the petitioner to federal habeas review under the rule of *Brown v. Allen*.[124] The court's reasoning in *Martinez* allows a state court to block federal habeas review by merely affirming without opinion in any case in which the prosecution raises the issue of procedural default.[125] This is impermissible.[126] The *Sykes* Court's reaffirmance of the rule of *Brown v. Allen* indicates that the Court did not intend to limit habeas review so radically.[127]

Second, the *Martinez* rule assumes that an adequate and independent state procedural ground exists whenever the prosecutor argues a procedural issue to the state court.[128] This approach is intolerable because, in

---

117. *See supra* notes 31-32 and accompanying text. *Compare* Jerome Hat Corp. v. Lou Temco Uniforms, Inc., 74 A.D.2d 745, 745, 425 N.Y.S.2d 255, 255 (1980) (mem.) (affirming on the basis of the opinion below) *with* People v. Salerno, 74 A.D.2d 745, 745 (1980) (mem.) (affirming without opinion).

118. *Compare* County Court v. Allen, 442 U.S. 140, 147-54 (1979) (searching record and state law for procedural default) *with* Campbell v. Wainwright, 738 F.2d 1573, 1578 (11th Cir. 1984) (assuming procedural default when prosecutor argues merits and procedure alternatively) *and* Martinez v. Harris, 675 F.2d 51, 54-55 (2d Cir.) (same), *cert. denied*, 459 U.S. 849 (1982) *with* White v. Estelle, 720 F.2d 415, 418 (5th Cir. 1983) (when state court record is unclear, federal courts will assume state court held on merits) *and* Williams v. Zahradnick, 632 F.2d 353, 357, 359-60 (4th Cir. 1980) (same).

119. 675 F.2d 51 (2d Cir.), *cert. denied*, 459 U.S. 849 (1982).

120. *See id.* at 54.

121. *See* Martinez v. Harris, 675 F.2d 51, 55 (2d Cir.), *cert. denied*, 459 U.S. 849 (1982).

122. *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

123. *See* Hawkins v. LeFevre, 758 F.2d 866, 872 (2d Cir. 1985); Edwards v. Jones, 720 F.2d 751, 757 (2d Cir. 1983) (Newman, J., concurring); L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985).

124. *See supra* note 123.

125. *See* Henry v. Wainwright, 686 F.2d 311, 314 & n.4 (5th Cir. 1982), *reversed on other grs.*, 463 U.S. 1223 (1983).

126. *Cf.* Michigan v. Long, 463 U.S. 1032, 1041 (1983) (similar reasoning in direct review) (quoting Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940)).

127. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985).

128. *See* Martinez v. Harris, 675 F.2d 51, 54 (2d Cir.), *cert. denied*, 459 U.S. 849 (1982). As a result of *Martinez*, any New York prosecutor may now assert a procedural

the event of a summary affirmance, it allows the prosecutor to defeat the petitioner's right to federal habeas review without proving that the state court relied on a procedural ground, and that the ground was both adequate and independent.

In the recent decision of *Hawkins v. LeFevre*,[129] the Second Circuit expressed its dissatisfaction with the *Martinez* rule and its unjust results.[130] In *Hawkins*, the prosecutor only argued the merits and the state appellate court affirmed the conviction without opinion.[131] On habeas review, the federal district court, citing *Martinez*, held that Hawkins was barred from habeas review due to a procedural default.[132] In reversing the district court, the *Hawkins* court stated that "[t]he scope of . . . *Martinez* . . . does not extend to all factual situations and, in particular, does not control the instant action."[133]

Curiously, the panel could have reached the same result by merely citing *Washington v. Harris*,[134] which provides that a federal habeas court should assume that a state court's summary affirmance of a conviction rests on constitutional grounds when the prosecutor argued solely on the merits.[135] The *Hawkins* Court's criticism of the district court's application of *Martinez* indicates that the Second Circuit may no longer be willing to apply automatically *Martinez* whenever the prosecutor argues a procedural default to the state appellate court. Indeed the court stated "[w]e choose not to extend *Martinez* and presume reliance by a state court on a procedural default, where it appears unlikely that the court rested its affirmance on that ground."[136] This statement may be a warning to state appellate courts to clearly identify the bases of their holdings, or risk federal habeas review.[137] Indeed, the court cited with approval Judge Newman's concern about the *Martinez* rule:

> What concerns me about the majority's inference from state court silent affirmance is the prospect that in some future case where a procedural default is arguable, but not clear, the [state appellate court] will silently affirm after deciding that there was neither procedural default

---

ground for affirmance in the State's brief to the Appellate Division in order to block federal habeas review. However, the prosecutor's procedural argument may not be accurate. *See, e.g.*, County Court v. Allen, 442 U.S. 140, 148 & n.6 (1979); Henry v. Wainwright, 686 F.2d 311, 314 (5th Cir. 1982), *reversed on other grounds*, 463 U.S. 1223 (1983).

129. 758 F.2d 866 (2d Cir. 1985).

130. *See id.* at 872-73.

131. *See id.* at 870 & n.6. "The Queens County District Attorney seemingly conceded that the trial judge's actions amounted to a constitutional violation, but argued that such error was harmless." *Id.* at 870.

132. *See id.* at 870.

133. *See id.* at 871.

134. 650 F.2d 447 (2d Cir. 1981), *cert. denied*, 455 U.S. 951 (1982).

135. *See id.* at 451-52.

136. Hawkins v. LeFevre, 758 F.2d 866, 874 (2d Cir. 1985).

137. *See id.* at 872 & n.8 ("[w]e continue to urge the state courts to remove the ambiguity in their summary affirmances by indicating, with citation to [the state rules of criminal procedure] . . . , their reliance on procedural default") (citation omitted).

> nor a valid claim on the merits, and we will then affirm the denial of habeas corpus relief because we mistakenly presume state court reliance on procedural default even though we think a constitutional error affecting substantial rights has occurred.[138]

In the past, the Supreme Court has attempted to solve the problem presented by unclear state opinions by searching the state court records—appellate and trial—to determine whether the state courts relied on a state procedural ground.[139] The major problem with this approach is that it is time-consuming[140] and therefore inefficient. This is a significant problem because one of the primary purposes of limiting habeas—relieving the burden on the lower federal courts[141]—is undermined by requiring federal habeas courts to search the trial and appellate records every time a state court fails to state clearly the basis of its holding.

---

136. *Id.* at 872 (quoting Edwards v. Jones, 750 F.2d 751, 757 (2d Cir. 1983) (Newman, J., concurring)).

139. *See, e.g.*, County Court v. Allen, 442 U.S. 140, 147 n.5, 152 (1979); Wainwright v. Sykes, 433 U.S. 72, 74-75, 87-88 (1977); Irvin v. Dowd, 359 U.S. 394, 402-04 (1959). Some circuits have also applied this method. *See, e.g.*, Preston v. Maggio, 705 F.2d 113, 116 (5th Cir. 1983); Hockenbury v. Sowders, 620 F.2d 111, 113 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981).

140. *See* Batchelor v. Cupp, 693 F.2d 859, 864 (9th Cir. 1982), *cert. denied*, 463 U.S. 1212 (1983).

141. *See* Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring); Friendly, *supra* note 43, at 143-51; *Federal Habeas Corpus Review*, *supra* note 3, at 863 & nn.68-69. It is correctly pointed out that *Sykes* may not effectively relieve the burden of the lower federal courts. *See id.* at 863 n.69. The *Sykes* rule may be an attempt by the Court to retain the supervisory role of the federal courts, while responding to the concerns expressed by Justice Jackson in *Brown*, 344 U.S. at 537-41 (Jackson, J., concurring). In that case he wrote:

> [T]his Court has sanctioned progressive trivialization of the writ until floods of state, frivolous and repetitious petitions inundate the dockets of the lower courts and swell our own. Judged by our own disposition of habeas corpus matters, they have, as a class, become peculiarly undeserving. It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search. . . .
>
> It cannot be denied that the trend of our decisions is to abandon rules of pleading or procedure which would protect the writ against abuse. . . .
>
> . . . It really has become necessary to plead nothing more than that the prisoner is in jail, wants to get out, and thinks it is illegal to hold him. If he fails, he may make the same plea over and over again.
>
> Since the Constitution and laws made pursuant to it are the supreme law and since the supremacy and uniformity of federal law are attainable only by a centralized source of authority, denial by a state of a claimed federal right must give some access to the federal judicial system. But federal interference with state administration of its criminal law should not be premature and should not occur where it is not needed.

*Id.* at 536-41 (footnotes omitted). However, when the petitioner's claim falls short of a miscarriage of justice and he cannot show good cause for his default, then his pleas, meritorious or frivolous, will not be heard. *See* Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977); Brown v. Allen, 344 U.S. 443, 541 (1953) (Jackson, J., concurring).

A second problem is that ad hoc federal determinations of the basis of state court decisions injure the policy of comity, a doctrine which requires predictable interaction[142] between state and federal courts. State courts should know how federal habeas courts will react to their decisions.[143] This is impossible if a case-by-case rule of interpretation is adopted.[144]

Finally, this approach is of limited use because it can lead to inaccurate results.[145] For example, if a state appellate court issues an affirmance without opinion,[146] it is impossible to determine which of several grounds asserted by the prosecution forms the basis of the appellate court's decision. Moreover, a search of the trial court record—always a time-consuming process—will be unavailing in many cases because trial courts often fail to address the issue either as a matter of procedure or on the merits.[147] Thus, the first state court to face the issue may be an appellate court or a state habeas court.[148] All of these reasons point to the inaccuracy inherent in this approach. Inaccurate results are intolerable when an individual's liberty is at stake.[149] In addition, such inaccuracies thwart the policy of comity[150] which the Burger Court has so zealously guarded.[151]

A third approach to the problem of unclear state holdings—one which avoids unduly burdening the federal courts—is for the federal habeas court to assume that the state appellate court relied on federal law whenever the basis of the state court's opinion is unclear.[152] This would pro-

---

142. *See* Michigan v. Long, 463 U.S. 1032, 1039 (1983).

143. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1987).

144. *See id.*

145. *See* Michigan v. Long, 463 U.S. 1032, 1039-40 (1983); *see also* Irvin v. Dowd, 359 U.S. 394, 403 (1959) (lower federal courts erred in construing the state court opinion as resting on state grounds).

146. *See supra* note 117.

147. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 263 & n.19 (1973) (Powell, J., concurring); *see, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 74-75 (1977); Phillips v. Smith, 717 F.2d 44, 46 (2d Cir. 1983), *cert. denied*, 106 S. Ct. 1287 (1986); Thompson v. Estelle, 642 F.2d 996, 998 (5th Cir. 1981).

148. *See* Sumner v. Mata, 449 U.S. 539, 541-42 (1981) (state appellate court); Wainwright v. Sykes, 433 U.S. 72, 75 (1977) (state habeas appeal); Martinez v. Harris, 675 F.2d 51, 53-54 (2d Cir.) (state appellate court), *cert. denied*, 459 U.S. 849 (1982); Washington v. Harris, 650 F.2d 447, 450-51 (2d Cir. 1981) (state appellate court), *cert. denied*, 455 U.S. 951 (1982); Hockenbury v. Sowders, 620 F.2d 111, 115 (6th Cir. 1980) (state appellate court), *cert. denied*, 450 U.S. 933 (1981); Preston v. Maggio, 705 F.2d 113, 114-15 (5th Cir. 1983) (appeal to state appellate court from denial of state habeas petition).

149. *See* Townsend v. Sain, 372 U.S. 293, 312-13 (1963); *see also* 28 U.S.C. § 2254(d)(2), (3), (6), (8) (1982). One of the policies of *Sykes* is to promote accuracy of results at trial. *See supra* notes 96-97 and accompanying text. It would be ironic if the accuracy promoted by the *Sykes* limit on habeas review was then subverted by the application of *Sykes* by the federal habeas courts to murky state court determinations.

150. *See* Michigan v. Long, 463 U.S. 1032, 1039-41 (1983).

151. *See supra* notes 91-93 and accompanying text.

152. *See* White v. Estelle, 720 F.2d 415, 418 (5th Cir. 1983) (assuming state court held on the merits); Williams v. Zahradnick, 632 F.2d 353, 359 & n.6, 360 (4th Cir. 1980);

tect the petitioner's right under *Brown v. Allen*[153] to federal review, while avoiding unfair burden on the lower federal courts.[154] This approach would also produce consistent results by avoiding ad hoc interpretations of state court opinions.[155] Finally, this method is supported by the Supreme Court's decision in *Michigan v. Long*.[156]

In *Long*, the Court on direct review confronted the problem of determining the basis of a state court's holding.[157] One basis for the state court's holding could have been an adequate and independent state ground, but the other could have been federal.[158] The Supreme Court held that review is not barred unless the state court includes "a 'plain statement' that a decision rests upon adequate and independent state grounds."[159] This rule assumes that there are no adequate and independent state grounds "'when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.'"[160] *Long* held that when it is not clear that adequate and independent state grounds support the judgment, the Supreme Court on direct appeal will assume that none exist.[161] Federal habeas courts should assume the same.

Arguably, applying the plain statement rule to state court opinions in the context of habeas review would allow the prisoner to obtain habeas review any time he merely asserted a federal claim. This argument is unpersuasive because it ignores the fact that if a valid state procedural ground exists and the state court's opinion clearly rests on that ground, the petitioner cannot secure habeas review by asserting a federal issue.[162] Requiring state courts to make a plain statement is a slight burden considering the prisoner's interest in securing federal habeas review.[163] A plain statement may be cursory; it does not require an in-depth written analysis.[164] Thus, the compromise of the state interest is slight in com-

---

(same); L. Yackle, *supra* note 3, § 84, at 142-43 (Cum. Supp. 1985) (federal habeas court should a. *ume state court held on merits*).

153. 344 U.S. 443 (1953).

154. *See supra* notes 140-41, *infra* notes 163-65 and accompanying text.

155. L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985). *See supra* note 121 and accompanying text.

156. 463 U.S. 1032 (1983).

157. *See id.* at 1037.

158. *See id.* The state court could have held on either state constitutional grounds or federal constitutional grounds on the issue of whether a search of defendant's car was illegal. *Id.* at 1043-44.

159. *Id.* at 1042.

160. *Id.* (footnote omitted).

161. *See id.*

162. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985). *See supra* notes 33-51, 58-116 and accompanying text.

163. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985); *cf.* Smith v. Digmon, 434 U.S. 332, 333-34 (1978) (exhaustion requirement is satisfied if petitioner raises the claim in state court, regardless of whether the state court passes on it).

164. *See* Hawkins v. LeFevre, 758 F.2d 866, 872 (2d Cir. 1985); Edwards v. Jones, 720

person to the total compromise of the prisoner's rights if another rule were adopted.[165]

Moreover, the state court is the controlling actor in this scenario. It has complete control over the content of its opinion,[166] and the content determines whether the *Sykes* cause and prejudice standard applies.[167] Therefore, the state court, by drafting an opinion with a plain statement, can determine whether federal habeas review will be freely given; the prisoner does not have that control. If the state court does not clearly indicate the basis for its holding, the doubt should be resolved against the state—the controlling actor—and *Sykes* should not apply.[168]

Finally, applying *Long*'s plain statement rule to habeas review does not unduly offend the systemic policies of *Sykes*. Under the plain statement rule the policies of finality and efficiency would be harmed only when the basis of the state court's opinion is ambiguous.[169] When a state court clearly indicates that its decision is based on adequate and independent state grounds, federal review would be unavailable absent a demonstra-

---

F.2d 751, 757 (2d Cir. 1983) (Newman, J., concurring); Henry v. Wainwright, 686 F.2d 311, 314 n.4 (5th Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983); 1 L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985); *cf.* County Court v. Allen, 442 U.S. 140, 153-54 (1979) (state court passed on merits of federal constitutional claim, despite brevity of its discussion of that issue); Martinez v. Harris, 675 F.2d 51, 54 (2d Cir.) (assuming procedural ground when no reasoning given), *cert. denied*, 459 U.S. 849 (1982).

165. *See* 1 L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985).

166. *See id.*

167. If the rationale is solely federal, then *Sykes* does not apply. *See supra* notes 52-57 and accompanying text. If the decision is based alternatively on federal and state grounds, *Sykes* should apply, though some circuits do not apply *Sykes* in this case. *See supra* notes 15-17, 58-116 and accompanying text. If the state ground is the sole basis, then *Sykes* applies. *See supra* notes 33-51 and accompanying text.

168. *See* 1 L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985); *cf.* Michigan v. Long, 463 U.S. 1032, 1042 (1983) (direct review of state court conviction). The Supreme Court in the context of direct review has stated:

> It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. . . . For no other course assures that important federal issues . . . will reach this Court for adjudication, that state courts will not be the final arbiters of important issues under the federal constitution, and that we will not encroach on the constitutional jurisdiction of the states.

Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940). In *National Tea* the Supreme Court vacated a state court judgment and remanded for a clarification of the basis of that court's decision. *See id.* at 556-57. A federal habeas court should not, however, employ that procedure. Vacating every state conviction in which the state court's reasoning was not clear would be contrary to the policy of comity. *See* Fay v. Noia, 372 U.S. 391, 467-68 (1963) (Harlan, J., dissenting). The problem is more easily solved by requiring a plain statement.

169. *See* Michigan v. Long, 463 U.S. 1032, 1041-42 (1983).

tion of cause and prejudice.[170] Further, to avoid federal habeas review, a state court need only briefly state in its opinion the adequate and independent state grounds.[171] Although it can be argued that placing requirements on the drafting of state courts' opinions offends comity, in these circumstances the offense is minimal. In the case of an unclear holding, the state court is asked to say more. It is not constrained from discussing federal law. Thus, applying *Long* to unclear holdings would not offend comity to the same extent that not applying *Sykes* to alternative holdings would.[172]

In *Long*, the Supreme Court discussed the effect of the plain statement rule on comity. First, the Court emphasized the problems presented when a reviewing court determines ad hoc whether a decision was based on adequate and independent state grounds.[173] The Court viewed that method as "antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved."[174] The Court then stated that the plain statement approach "provide[s] state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law. . . . '[It is important] that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by [the Supreme Court] of the validity under the federal constitution of state action.' "[175] Thus the Court indicated that the plain statement rule might actually promote rather than offend comity.

Because the alternatives to applying the plain statement rule to habeas corpus review are to accept ad hoc determinations by reviewing courts[176] or to assume that the claim is procedurally barred,[177] any injury to comity arising from applying *Long* to unclear state holdings is tolerable.[178] Although more friction may arise from applying *Long* in the habeas context than on direct review, this merely reflects the fact that habeas review by its very nature creates friction between federal and state courts.[179] Further, applying *Long* to unclear holdings furthers *Brown v. Allen*'s protection of state prisoners against violations of their federal rights by the states.[180] Finally, although applying *Long* to habeas review may com-

170. See *supra* note 24 and accompanying text; *cf. Long*, 463 U.S. at 1043-44 (rule applied in context of direct review).

171. See *supra* note 164 and accompanying text.

172. See *supra* notes 142-44 and accompanying text.

173. *See* Michigan v. Long, 463 U.S. 1032, 1039 (1983).

174. *Id.*

175. *Id.* at 1041 (quoting Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940)).

176. See *supra* notes 139-51 and accompanying text.

177. See *supra* notes 120-28 and accompanying text.

178. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985).

179. *See* Engle v. Isaac, 456 U.S. 107, 128 & n.33 (1982); Sumner v. Mata, 449 U.S. 539, 550 (1981); Norris v. United States, 687 F.2d 899, 901 (7th Cir. 1982); 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4261, at 600 (1978).

180. See *supra* notes 122-27 and accompanying text.

promise comity slightly, it also furthers comity since it is a consistent and predictable approach.

## CONCLUSION

The *Sykes* cause and prejudice standard should be applied whenever a state court, solely or alternatively, relies on a procedural ground that constitutes an adequate and independent state ground. If the state court does not rely on a state ground, free habeas review as guaranteed by *Brown v. Allen* should be granted. When the basis of the state conviction is unclear, the federal court should apply the plain statement rule established by the Court in *Michigan v. Long*. When it is not clear that adequate and independent state grounds support the conviction, the federal habeas court should assume none exist and therefore grant habeas review.

These rules further the systemic policies enunciated by the Court in *Sykes*. Although applying *Long* to habeas review might slightly increase federal-state friction, this is tolerable. If *Long* is not applied to unclear holdings, the alternatives are to accept ad hoc determinations by reviewing courts, which can lead to even greater friction between the two court systems, or risk sacrificing the state prisoner's right to federal adjudication of his federal claim even though that claim is not barred by an adequate and independent state procedural ground.

*James W. Dobbins*

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F SPANIOL, JR.
CLERK OF THE COURT

AREA CODE 202
479-3011

December 30, 1987

Jack Donatelli, Esquire
Assistant Attorney General
of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601

Re: 87-5677 - Warren Lee Harris v. Marvin Reed, Warden, et al.

Dear Mr. Donatelli:

On October 16, 1987, a petition for a writ of certiorari in the above case was filed in this Court to review an order of the United States Court of Appeals for the Seventh Circuit (No. 86-2032), dated June 12, 1987. Our records indicate that you were served with a copy of the petition.

The Court has directed this office to request that a response be filed in this case. Ten typewritten or otherwise reproduced copies of your response, together with proof of service thereof, should reach this office on or before January 29, 1988.

Kindly acknowledge receipt of this letter on the enclosed copy.

Very truly yours,

Joseph F. Spaniol, Jr.
Clerk

Enclosure

cc: Kimball R. Anderson, Esquire